IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Writ Petition No.4702 of 2006

Shivaji Mahadev Garud — Petitioner (Org.Deft.No.2)

Vs.

Janab Mazoon Saheb Sayedi
Khuzaimabhai Saheb Qutbuddine & ors. — Respondents

With
Writ Petition NO.4703 of 2006

Vijaybhai Chalke — Petitioner (Org.Deft.No.3)

Vs.

Janab Mazoon Saheb Sayedi
Khuzaimabhai Saheb Qutbuddine & ors. — Respondents

Ms.J.P.Thakkar for petitioners in both the petitions.

Mr.M.J.Shetty with Mr.R.V.Yadiv for Resp.No.11 in both the petitions.

CORAM: B.H.MARLAPALLE,J.
July 31, 2006.

P.C.

1. Heard. Rule. Mr.Yadiv waives service for Resp. No.11. By consent, Rule is made returnable forthwith.

2. The first petition is filed by the Defendant No.2 and the second petition is filed by the Defendant No.3 in R.A.E. & R. Suit No.1390/5009 of 1982. Interim Notice Nos.1409 of 2003 and 33 of 2006 came to be discharged by the impugned orders dated

23/6/2006 by the learned Judge of the Small Causes Court at Mumbai. These notices were taken out for seeking amendments in the Written Statement filed on 12th October 1983.

3. The learned Judge of the trial Court held, inter alia, that the amendment applications taken out on the basis of the documents which were handed over to the learned Advocate engaged earlier were not referred in the original written statement and the applicants could not give any satisfactory explanation that it was on account of the Advocate's negligence. The submissions of the applicants were that on engaging another Advocate who went through the written statement as well as copies of the documents submitted to her informed them that main pleas on the basis of the documents were not incorporated in the written statement and, therefore, the amendment was found to be necessary. The learned Judge of the trial Court was not satisfied with this explanation as well notwithstanding the fact that the copies of the documents were placed on record.

4. There is no dispute that on receiving the notices in the suit the defendants had caused their

appearance through their Advocate Shri Jain on 22/8/1983 and the written statement was filed on 12/10/1983. The suit was dismissed in default on 15/7/1996 and it was restored on 24/11/2000. The suit was again decided ex-parte on 3/6/2003 but on the application made by the defendants the ex-parte decree was set aside and the suit was restored to file on 5/4/2005. On 14/10/2005 the plaintiffs' Advocate had approached the Advocate for Defendant Nos.2 and 3 for inspection of documents and such an inspection was given to him on 11/11/2005. The defendant no.3 moved Interim Notice No.1409 of 2003 on 13/9/2005 whereas defendant no.2 moved Interim Notice No.33 of 2006 on 14/10/2005 seeking amendments in the written statement filed earlier i.e. in October 1983.

5. The Schedule of the proposed amendments in both the Notices is common except the change in number of the defendant. The amendments were sought solely on the ground of the documents viz. two deeds of assignments, licence under the Shops and Establishments Act, BMC licences, rent receipts, electricity bills, telephone bills and the letters received from the Mumbai Municipal Corporation as

well as the copies of the proceedings filed by the said Corporation against the defendants. When the plea for the amendment was being supported by the documents which were registered and which were issued by public bodies, notwithstanding the fact that these documents were subject to proof during the course of evidence, there was a case made out for allowing the amendment application and the plaintiffs were always at liberty to refute the challenge or in any manner deny such amendments by filing rejoinder or the amended plaint. It was not permissible for the trial Court to reject the plea for amendment on the ground that there was no proper explanation furnished as to why earlier Advocate had not taken note of the documents now placed before the Court and did not take steps for amendment of the written statement earlier. Looking at the fact that the suit was restored on 5th April 2005 after setting aside the ex-parte decree, it was necessary for the trial Court to take a fresh look in the pleas sought to be taken on the basis of all the documents and these documents would of course be subject to being proved by leading evidence. If these documents are not allowed to be brought on record by amending the written statement, the trial of the pending suit will not be effective

and consequently it may lead to multiplicity of litigation. The reliance placed by the learned counsel for the petitioners on the decision of this Court in the case of Badrinarayan Bansilal Somani v. Vinodkumar K. Shah **[2003 (3) Bom.C.R. 231]** clearly supports her case.

6. In the premises these petitions succeed and the same are hereby allowed. The impugned orders passed in Interim Notice No.33 of 2006 and 1409 of 2003 are hereby quashed and set aside and the said Notices are allowed. The petitioners-defendants shall amend the written statement within two weeks from today before the trial Court and it is further directed that the trial of R.A.E. & R. Suit No.1390/5009 of 1982 shall be completed as expeditiously as possible and preferably by 31st May 2007.

7. Rule made absolute accordingly with no order as to costs. Writ to go forthwith.

(B.H.MARLAPALLE,J.)